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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 220

WILLIAM O'DWYER AND SLOAN O'DWYER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 7a–18a)[1] are reported at 28 T.C. 698. The opinion of the court of appeals (Pet. App. 35–56) is reported at 266 F. 2d 575.

JURISDICTION

The judgment of the court of appeals was entered April 21, 1959. The petition for a writ of certiorari was filed July 16, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Record references are to the Appendix to the taxpayer's brief below, copies of which have been filed with this Court.

QUESTIONS PRESENTED

1. Whether the Tax Court was correct in determining that the taxpayer[2] received $10,000 in taxable income in the year 1949, where the Commissioner adduced evidence establishing the receipt of such income and the taxpayer offered no proof to the contrary.

2. Whether the Tax Court properly determined the amounts of the taxpayer's deductible business expenses for the years 1950 and 1951.

3. Whether the Tax Court was correct in determining that taxpayer Sloan O'Dwyer received $1,500 in taxable income in the year 1951, where the Commissioner adduced evidence establishing the receipt of such income and the taxpayer offered no proof to the contrary.

4. Whether the Tax Court properly denied the taxpayer's demand for production of all of the Commissioner's files, including the confidential revenue agents' reports, relating to the tax deficiencies asserted against him.

STATUTES AND RULING INVOLVED

Sections 22(a) and (b)(3), 23(a)(1)(A), and 23(a)(2) of the Internal Revenue Code of 1939 and Rev. Rul. 54–80 are set forth in the Appendix, *infra*, pp. 20–22.

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[2] Except for one item of income in the year 1951, taxpayer Sloan O'Dwyer is a party solely by reason of having filed joint returns with her husband. Accordingly, the taxpayer William O'Dwyer will be referred to as the taxpayer unless otherwise stated.

STATEMENT

The taxpayers filed petitions with the Tax Court for redetermination of deficiencies found by the Commissioner in their income tax for the years 1949, 1950, and 1951, totaling approximately $20,000 (R. 8a). As a result of the proceedings in the Tax Court, the deficiencies for the three years were redetermined as $8,242.12 (R. 18a–19a). On petitions for review, the court of appeals affirmed (Pet. 56).

The facts as found by the Tax Court may be briefly summarized as follows:

1. The taxpayer, William O'Dwyer, was Mayor of the City of New York from November 1945, until he resigned in August 1950 (R. 9a). In the early part of 1949 relations between the taxpayer and the Uniformed Firemen's Association of New York had become strained as the result of a resolution adopted by the latter stating that it would not support the taxpayer for reelection unless he lived up to a promise to support legislation involving firemen's salaries. Subsequently, however, John P. Crane, the president of the Association, decided to heal these differences and to give the taxpayer $10,000 to evidence the support of the Firemen's Association. Terrance Dolan, the treasurer of the Association had withdrawn $5,000 from the Association's bank account on September 26, 1949, and this money was on hand on October 6, 1949. Crane informed Dolan that he wanted a sum of $10,000. Accordingly, on October 6, 1949, Dolan withdrew an additional $5,000 and gave the two sums to Crane in two "standard-size" white envelopes. After Dolan took the $10,000 in two packages out of

his safe and gave it to Crane, the latter placed it in a second safe in the Association's office and instructed the girl who had the combination to the safe to report to work early on the morning of October 10, 1949, in order that he could get the money out of the safe (R. 9a–10a).

Some time before these events, Crane had met the taxpayer on the steps of City Hall in New York and had told him that he wanted to see him. The taxpayer had told Crane to "drop up" to Gracie Mansion, the official residence of the Mayor of New York. On the morning of Monday, October 10, 1949, Crane went to the office of the Firemen's Association at about 8:30 A.M. Upon arrival at the office Crane took the money from the safe, broke open the two packages and placed the money in a brown manila envelope (R. 10a). Crane then drove his car to a fire station on 67th Street in New York where he met Victor Wilders, a fireman stationed there who was to see to it that Crane's car would be taken to Mezey Motors for servicing. After leaving the garage, Wilders offered to drive Crane wherever he wished to go. Crane directed Wilders to drive to a building at 96th Street and Park Avenue in New York City to meet Jerry Finkelstein, who was the manager of the taxpayer's campaign for reelection as Mayor of New York. Crane had previously promised Finkelstein that when he went to see taxpayer with a contribution for the campaign he would allow Finkelstein "to come along." On the way to 96th Street and Park Avenue, Wilders had to make a sudden stop at a traffic light. This caused the flap

of the envelope on Crane's lap to open, and Wilders saw money in the envelope (R. 10a–11a).

Upon arrival at the gate of Gracie Mansion, a policeman stopped the car, put his head in the door, and, upon seeing Finkelstein, told Wilders to go ahead. Crane got out of the car and went up the steps of Gracie Mansion where he met the taxpayer coming out the front door. Crane handed the manila envelope containing the $10,000 to the taxpayer who thanked him, walked back to the door, and tossed it to someone inside the house. Finkelstein then came up the steps and spoke to taxpayer on the porch. Taxpayer, Crane, and Finkelstein came down the steps together. Crane and Finkelstein entered Wilders' car, and they drove off (R. 11a). The Commissioner included the $10,000 amount in the taxable income of the taxpayer for 1949 (R. 11a).

2. After the taxpayer was nominated as Ambassador to the Republic of Mexico on August 30, 1950, he and his wife kept a record of the expenditures made by them during the remainder of 1950 and the year 1951. Some were ordinary and necessary expenses connected with the taxpayer's activities as ambassador and some were personal. This record listed the dates and gave some indication of the nature of the various expenditures, but in many instances it did not contain sufficient information from which it could be determined whether a particular expenditure was of a business or personal nature. The taxpayer and his wife were in Mexico for approximately 33 days during 1950 and their expenditures during that period were listed as "Mexican Expenses." The total of all

expenditures made by the taxpayer and his wife from August 30, 1950, to December 31, 1950, was $7,678.63; their total expenditures for 1951 amounted to $28,390.76. The taxpayer received reimbursements from the Department of State for certain expenses incurred by him in connection with his duties as ambassador. He received $542.69 as such reimbursement in 1950 and $10,124.60 in 1951. In their tax returns for these years, the taxpayer and his wife claimed deductions of $6,135.94 and $12,266.26 respectively for "expenses in connection with earning income". These amounts were arrived at by deducting from the total expenditures in each year the sums received as reimbursement together with an estimated amount for personal expenses. The amount estimated for such personal expenses for "one month" in 1950 was $1,000, and the amount estimated for 1951 was $6,000. The Commissioner originally disallowed the entire amount of $6,135.94 claimed as a deduction for 1950 and $10,000 of the $12,266.26 claimed for the year 1951 "for lack of substantiation" (R. 11a–12a).

3. On July 8, 1951, taxpayer Sloan O'Dwyer deposited $1,500 in a joint bank account maintained under her name and that of her mother, Eleanora Young, with the Chase National Bank of the City of New York. The Commissioner included this amount in the taxable income of the taxpayers for 1951 (R. 12a).

4. At the opening of the hearing before the Tax Court, the taxpayer moved for an order directing compliance with a subpoena *duces tecum* addressed

to the Regional Commissioner of Internal Revenue which in substance directed that official to produce all of his records and files, including the confidential revenue agents' reports, which were used as a basis for determining the deficiencies. The Government voluntarily produced some of the items requested by the subpoena, but refused to surrender the confidential revenue agents' reports. The Tax Court held that the taxpayer was not entitled to those reports merely on the basis of a general claim that the deficiencies were arbitrary and the proceedings improperly motivated. As a result of this ruling, the taxpayer refused to present any further evidence (R. 13a–15a).

The Tax Court held, with respect to the payment of $10,000 in 1949, that, although a political contribution is not taxable income to the recipient, if the recipient diverts the money to his personal use it becomes taxable income to him. In the absence of evidence from the taxpayer, the Tax Court felt compelled to conclude that he had not met the burden of proof imposed upon him to show that the sum of $10,000 paid in 1949 was not diverted to his personal use. As to the business deductions claimed for 1950 and 1951, the Commissioner in his brief before the Tax Court conceded the deductibility of $1,002.31 for 1950 and $5,212.63 for 1951. The Tax Court found that the evidence submitted to it as to the deductibility of the various expenditures rendered it difficult, if not impossible, in many instances to determine whether a particular expenditure was per-

sonal or related to the taxpayer's activities as ambassador. It therefore applied the rule of *Cohan* v. *Commissioner,* 39 F. 2d 540 (C.A. 2), and estimated that the amounts attributable to the taxpayer's duties as ambassador were $2,500 for 1950 and $18,000 for 1951. After deducting from these amounts the sums taxpayer received as reimbursement, the Tax Court concluded that the taxpayer was entitled to a deduction of $1,957.31 for 1950 and $7,875.50 for 1951. With respect to the remaining item, namely the deposit of $1,500 by taxpayer Sloan O'Dwyer in 1951, this amount had originally been included in additional income underlying a deficiency asserted by the Commissioner for that year of $15,656.48. Prior to the trial, however, the Commissioner conceded that $14,156.48 was not taxable income to either taxpayer, which left in issue only the amount of $1,500. The taxpayer contended that this concession by the Commissioner destroyed any presumption of correctness as to such $1,500. The Tax Court found such contention to be without merit and held that the burden of proof was on taxpayers with respect to the $1,500. Taxpayer Sloan O'Dwyer having failed to come forward with any explanation for this item, it was held that the sum of $1,500 was properly included in taxable income for 1951 (R. 13a–18a).

The court of appeals in a lengthy opinion affirmed the decisions of the Tax Court on each of the issues litigated and concluded that the deficiences as redetermined were proper in all respects and that the

taxpayer had not been denied any of the procedural rights to which he was entitled (Pet. App. 35–56).

ARGUMENT

This case presents a variety of issues which involve the application of settled principles of tax law and most of which turn upon disputed questions of fact. On none of these issues is there any conflict of decisions which can be relied upon as the basis for a grant of certiorari, nor is there any substantial question of law which would merit review by this Court.

1. Taxpayer attacks the finding of the Tax Court that the taxpayer received the $10,000 from Crane in 1949 on the grounds that this finding was not supported by the evidence (Pet. 5–8, 9–10) and was not approved by the court of appeals (Pet. 11). In fact, the court of appeals determined that the Tax Court's findings were not clearly erroneous, refused to reverse such findings in the face of taxpayer's arguments, and affirmed the judgment in all respects. The validity of such findings, affirmed by the court of appeals, does not present an issue calling for the exercise of this Court's certiorari jurisdiction. *Corn Products Co.* v. *Commissioner*, 350 U.S. 46; *Comstock* v. *Group of Investors*, 335 U.S. 211.

The evidence introduced by the Commissioner, which was summarized in the Statement, *supra*, pp. 3–5, clearly supports the conclusion of the Tax Court that the taxpayer received the $10,000. Nevertheless, the taxpayer refused to testify or present any evi-

dence in his own behalf,[3] but instead contented himself with an attack upon the credibility of the Commissioner's witnesses. The Tax Court, which allowed thorough cross-examination, carefully considered the testimony of these witnesses and concluded that their testimony represented the truth (R. 13a; Pet App. 47-48).[4] The court of appeals, noting that the testimony of these witnesses was unrefuted, that the taxpayer was in a position to refute such testimony as untrue, and that his failure to offer such testimony gave rise to an inference that his testimony would have been unfavorable to his case (*Stoumen* v. *Commissioner*, 208 F. 2d

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[3] Although the taxpayer asserts (Pet. 9, 22) that he placed in evidence his own sworn statement denying the facts testified to by Crane and others, this statement was admitted in evidence only for the purpose of showing that it was before the Commissioner when he made his determination (Brief of Commissioner in the court of appeals, p. 54). The petitioner also says (Pet. 9, 22) that his net-worth statement was introduced in evidence. This statement was, of course, irrelevant to any of the issues, since the case was not tried on a net-worth theory. The only relevant evidence which petitioner introduced was a stipulation as to his expenditures in 1950 and a listing of expenses for 1951, both of which related to the issue of deductible expenses (Pet. App. 54).

[4] The taxpayer asserts (Pet. 9) that Finkelstein contradicted under oath the testimony of the Commissioner's witnesses. There is no evidence, however, in the record, as to such denials by Finkelstein; the taxpayer refers only to questions by his counsel in cross-examining Crane as to whether Crane knew that Finkelstein had so testified in another court (R. 130a-131a). These questions do not, of course, constitute evidence. The taxpayer further claims (Pet. 6-8) inconsistencies in the testimony of Crane, Dolan, and Wilders. The Tax Court, however, found that these inconsistencies were "inconsequential" (R. 13a).

903 (C.A. 3)), concluded that the findings were not clearly erroneous.

As an alternative to his attack on the findings, the taxpayer seeks (Pet. 11–18) to raise an issue which he first argued in the court of appeals, namely, that, even if the $10,000 payment was received by him, it could not be considered taxable income since a gift does not constitute taxable income. The evidence, however, fails to support this contention. The Commissioner produced evidence in the Tax Court that the payment of $10,000 was delivered to the taxpayer personally and in the immediate presence of his campaign manager by the unusual means of a payment in cash. It was incumbent upon the taxpayer to establish by competent proof that this money was received and used as a genuine campaign contribution, and thus did not constitute income to the taxpayer.

Section 22(a) of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 20) defines income in the broadest terms and includes gains, profits, and income "derived from any source whatever." As this Court has held, that language was used by Congress in order to assert the full measure of the taxing power. *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426. Consistent with this concept, a political contribution represents taxable income to the recipient if diverted by him to his personal use or benefit. This

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There is no basis for the taxpayer's assertion (Pet. 11) that the decision below raises constitutional questions as to the validity of the statute under the Sixteenth Amendment. The issue is whether the payment to the taxpayer in fact constituted taxable income or a non-taxable gift, not whether Congress has purported to tax gifts.

is the view which has been taken both by the Commissioner and by the courts. In I.T. 3276, 1939-1 Cum. Bull. 108, the Commissioner ruled that a political gift does not constitute taxable income to the recipient. In Rev. Rul. 54-80, 1954-1 Cum. Bull. 11 (Appendix, *infra*, pp. 21-22), the Commissioner supplemented this ruling by declaring that if the recipient diverts a political contribution to his personal use or benefit it becomes taxable income to him. The Tax Court had previously come to the same conclusion in *Reichert* v. *Commissioner*, 19 T.C. 1027, affirmed on other grounds, 214 F. 2d 19 (C.A. 7), certiorari denied, 348 U.S. 909, and the Court of Appeals for the Seventh Circuit had likewise indicated some years earlier in *Paschen* v. *United States*, 70 F. 2d 491, 500, that campaign contributions would not constitute taxable income only if a recipient could show that they were paid out for campaign purposes and were not retained by him for personal use.

The rationale of these interpretations and decisions is clear. If a campaign contribution is to be considered a gift, it is necessarily a conditional gift in that the money is given with the express or implied limitation that it be used for campaign purposes. If the recipient diverts the funds to his personal use, the purpose of the gift has been frustrated and the conditions breached. It is settled that where a gift is made on condition that it be used for specified purposes, but it is not used for the purposes specified, the donor is entitled to rescind the gift and to demand the return of the funds given. *Herman* v. *Brooklyn Savings Bank*, 196 App. Div. 269, 187 N.Y.

Supp. 738. Thus, a recipient who diverts to his personal use funds given to him for campaign purposes has converted such funds and is chargeable with taxable income.[6]

2. The taxpayer asserts (Pet. 30–32) that the Tax Court erred in disallowing his claimed deductions for 1950 and 1951 under Section 23 (a)(1)(A) or (a)(2) of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 20–21). Inasmuch as the evidence submitted by the taxpayer on this issue consisted only of listings of total amounts expended under various categories such as cigars and cigarettes, wines and liquors, food and household, gifts and medals, telephone and telegraph, flowers, furnishings, and entertainment (Pet. App. 54), it is manifest that the Tax Court could not be certain that the entire amounts claimed were deductible. In fact, the taxpayer conceded that not all of these sums were deductible for he himself subtracted $1,000 in 1950 and $6,000 in 1951 as personal expenditures (R. 12a). Since the taxpayer failed to substantiate these deductions, the Tax Court would have been warranted in disallowing them entirely. *Burnet* v. *Houston*, 283 U.S. 223. Instead, it applied the rule of *Cohan* v. *Commissioner*, 39 F. 2d 540 (C.A. 2),[7] and made a reasonable estimate.

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[6] The courts have repeatedly held, in a variety of contexts, that funds wrongfully acquired constitute taxable income to the recipient. See, *e.g.*, *Rutkin* v. *United States*, 343 U.S. 130; *Briggs* v. *United States*, 214 F. 2d 619 (C.A. 4), certiorari denied, 348 U.S. 864.

[7] For the computations of the Tax Court, see *supra*, pp. 7–8. In *Cohan*, Judge Learned Hand stated that "the Board [of Tax Appeals] should make as close an approximation as it

3. The taxpayer contends (Pet. 33–34) that the Commissioner improperly determined as income an unexplained deposit of $1,500 made by taxpayer Sloan O'Dwyer in 1951 to the credit of a joint account which she maintained with her mother in a New York bank. The Commissioner introduced evidence of a deposit to the account of the taxpayer in a New York bank, forwarded by her from Mexico. Nevertheless, the taxpayer wholly failed to present any evidence as to such deposit in order to meet the burden of proof resulting from the Commissioner's notice of deficiency. In the absence of such evidence, it was properly held to constitute taxable income. *Halle* v. *Commissioner*, 175 F. 2d 500 (C.A. 2), certiorari denied, 338 U.S. 949; *Hoefle* v. *Commissioner*, 114 F. 2d 713 (C.A. 6); *Boyett* v. *Commissioner*, 204 F. 2d 205 (C.A. 5); *Doll* v. *Glenn*, 231 F. 2d 186 (C.A. 6). See also *Greenfeld* v. *Commissioner*, 165 F. 2d 318 (C.A. 4).

The taxpayer appears to argue (Pet. 34) that this item cannot constitute taxable income to her because it was deposited to the credit of a joint account which she maintained with her mother. The deposit, however, was made by her and not by her mother. Moreover, since she had an undivided interest in the account which was subject to her withdrawal (New York Banking Law, Sec. 134 (4 McKinney's Consolidated Laws of New York (1950), Sec. 134)) she cannot maintain that the funds represented by the deposit belonged to her mother rather than to herself.

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can, bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making." 39 F. 2d at 544.

4. The taxpayer claims (Pet. 18–26) that the refusal of the Tax Court to enforce subpoenas requiring the Commissioner to produce confidential reports of revenue agents[*] constituted a denial of due process. This argument is based upon the erroneous premise that the Tax Court, in redetermining the deficiency asserted by the Commissioner, must review the files of the Commissioner and evaluate the evidence and conclusions upon which the Commissioner's determination of deficiency was based. In redetermining the deficiency asserted by the Commissioner, the Tax Court is required to apply the rules of evidence applicable to non-jury trials in the District Court for the District of Columbia and to make findings of fact upon such evidence. Sections 7453 and 7459(b), Internal Revenue Code of 1954 (26 U.S.C. 1952 ed., Supp. V, Secs. 7453, 7459(b)). The Tax Court renders its decision only upon the evidence produced before it with the burden of proof resting upon the taxpayer. *Fairmont Aluminum Co.* v. *Commissioner,* 22 T.C. 1377, affirmed, 222 F. 2d 622 (C.A. 4); *379 Madison Avenue* v. *Commissioner,* 60 F. 2d 68 (C.A. 2). If the taxpayer adduces evidence showing the deficiency to be erroneous, the burden of going forward with evidence to support the deficiency (but not the burden of proof) shifts to the Commissioner. But the Commissioner cannot support that deficiency by producing his agents' reports for they would be clearly inadmissible as hearsay.

[*] At the request of taxpayer's counsel, the Government did produce various items including the statements of the taxpayer, Crane, and Dolan (Pet. App. 38).

The taxpayer rests his due process argument (Pet. 23–24) upon *Simmons* v. *United States* 348 U.S. 397, and *Gonzales* v. *United States*, 348 U.S. 407. Those cases, however, as the court of appeals noted (Pet. App. 43), are wholly inapplicable to the present situation. They involved a practice under which hearing officers operating under the Selective Service Act relied upon secret F.B.I. reports which were not disclosed to the registrant. No use of secret evidence has been made by the Tax Court. The evidence upon which its findings and decision are based is that contained in the record before this Court. No claim of a denial of due process can be premised upon the erroneous assumption that the confidential revenue agents' reports were made available to the Tax Court but not to the taxpayer.

The taxpayer further asserts (Pet. 19–22) that he was entitled to inspect the revenue agents' reports in order to demonstrate that the Commissioner's deficiency determination was arbitrarily made. He cites, however, no authority which would support the proposition that a general unsupported allegation that the deficiency determination was arbitrarily made creates a right to inspect the Commissioner's confidential files in order to buttress such an allegation. In *Helvering* v. *Taylor*, 293 U.S. 507, as well as in the other cases which the taxpayer cites (Pet. 19), the taxpayer had produced evidence that the determination was arbitrarily made.[9] Here the taxpayer

[9] Moreover, in *Taylor*, this Court merely held that, where a taxpayer has adduced evidence that a deficiency determination is erroneous, he need not also prove the correct amount of tax due as in the case of a refund suit. Similarly, in *Blair* v. *Oesterlein Co.*, 275 U.S. 220 (Pet. 20), a wholly different situation was presented. That case involved excess profits taxes for the years 1918, 1919, and 1920, and the Commissioner in

presented no evidence in the Tax Court which would tend to show that the Commissioner's files contained no facts which would support the deficiency asserted. He simply made the charge that the deficiency was arbitrary and motivated by improper considerations, as he does now (Pet. 8–9),[10] and, having made that charge, he maintained that he was entitled to see all of the Commissioner's files in order to support it. Since the Commissioner produced in the Tax Court the testimony of three witnesses concerning the payment of $10,000 to the taxpayer in 1949 (Pet. App. 45), and several documents supporting the $1,500 bank deposit in 1951 (Pet. App. 55), it has become obvious that the Commissioner's files did contain evidence to support the deficiency determination.

Lastly, the taxpayer asserts (Pet. 26–29) that he was entitled to inspect the confidential reports of the revenue agents because under Section 10(e) of the Administrative Procedure Act, c. 324, 60 Stat. 237 (5 U.S.C. 1009(e)), the Tax Court is a "reviewing

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computing the tax was required by Section 328 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, to compare the taxpayer with other corporations which were similarly circumstanced with respect to gross and net income, proceeds, capital, and other relevant facts. In view of the fact that the statutory tax computation rested upon a comparison of taxpayer with twelve other corporations, it was necessary for the taxpayer to have the returns of these corporations in order that he might have the opportunity to show that they were not similarly circumstanced. Even in that case, however, the Court did not order production of any revenue agents' reports, but merely the returns of the other corporations.

[10] This assertion, which taxpayer also made in the Tax Court and court of appeals, was condemned in vigorous terms by the court of appeals as unsupported (Pet. App. 42–43).

court," and consequently is required to review the files of the administrative agency involved, *i.e.*, the Internal Revenue Service. The Tax Court, however, is neither an administrative agency within the meaning of the Administrative Procedure Act (*Kennedy Name Plate Co.* v. *Commissioner*, 170 F. 2d 196 (C.A. 9); *Cohen* v. *Commissioner*, 176 F. 2d 394 (C.A. 10)), nor is it a reviewing court under that Act. Instead, it is the Tax Court's decision which is subject to review by a court of appeals, and it is the latter which is the "reviewing court." *Lincoln Electric Co.* v. *Commissioner*, 162 F. 2d 379 (C.A. 6).

Determinations of the Commissioner, which are subject to a trial *de novo* in the Tax Court, are not the type of determinations required by Sections 5, 7, and 8 of the Act (5 U.S.C. 1004, 1006, 1007) to be made only after a hearing on the basis of a record; rather they are exempted from the provisions of the Act because a subsequent hearing is available in the Tax Court under the provisions of the Internal Revenue Code. See S. Doc. No. 248, 79th Cong., 2d Sess., pp. 22, 214, 278. Since the Commissioner is not required to hold a hearing, the record here originated in the Tax Court in the form of evidence adduced before it. As the court of appeals properly stated (Pet. App. 10), if Section 10(e) of the Administrative Procedure Act constitutes the Tax Court a "reviewing court," it "would be meaningless," for the Tax Court has no record to review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER 1959.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) [As amended by Sec. 1, Public Salary Tax Act of 1939, c. 59, 53 Stat. 574 and by Sec. 111(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

(3) *Gifts, bequests, devises, and inheritances.*—The value of property acquired by gift, bequest, devise, or inheritance. * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 22)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [as amended by Sec. 121(a), Revenue Act of 1942, *supra*] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *.

* * * * *

(2) *Non-trade or non-business expenses.*—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

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(26 U.S.C. 1952 ed., Sec. 23)

Rev. Rul. 54–80, 1954–1 Cum. Bull. 11:

Advice is requested whether that part of the political contributions received by a political organization or an individual seeking political office which is diverted to the personal use of the candidate or other individual constitutes taxable income to such candidate or other individual.

Contributions to political organizations are customarily made with the intent and understanding that they be used for the expenses of a political campaign or for some similar purpose. Such contributions are not deductible for Federal income tax purposes by the donor. See I.T. 3276, C.B. 1939–1 (Part 1), 108.

Where a political gift is received by an individual or a political organization and it is held or used for the purposes intended, i.e., for present or future expenses of a political cam-

paign or for some similar purpose, it is not taxable income to the recipient. See I.T. 3276, *supra*. However, any amount diverted from the channel of campaign activities and used by a candidate or other individual for personal use constitutes taxable income to such candidate or other individual for the year in which the funds are so diverted. For example, a candidate seeking political office receives contributions totaling $1,000 from individuals and organizations for use in his campaign for election to such office. During the campaign the candidate expends $600 of the contributed funds for campaign purposes. He uses the balance of the campaign funds to reduce the mortgage on his personal residence. In such a case the candidate will be required to include in his taxable income the $400 which represents the portion of the fund which he diverted to his personal use. Such amount will be includible in taxable income in the year in which so diverted.

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U.S. GOVERNMENT PRINTING OFFICE 1959